BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLOTTE A. COX Claimant	)	
VS.	)	
COUNTRY HAVEN/NORTH POINT SKILLED NURSING CENTER Respondent	)	Docket No. 1,003,575
AND	)	
DIAMOND INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 4, 2008, post-award medical Award entered by Administrative Law Judge Robert H. Foerschler. Leah Brown Burkhead, of Mission, Kansas, appeared for claimant. J. Scott Gordon, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant's need for a total left knee replacement was not caused by the work-related series of accidents through May 2003 but was caused by a combination of her preexisting condition and the natural aging process. Claimant's request for post-award medical treatment was denied, as was claimant's attorney's request for attorney fees.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 29, 2007, Post-Award Medical Hearing and the exhibits, the transcript of the January 23, 2003, Preliminary Hearing and the exhibits, and the transcript of the May 23, 2003, Settlement Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues that if a preexisting condition is aggravated or accelerated by an on-the-job injury, the claimant is entitled to be fully compensated. Claimant asserts that it is undisputed that claimant had degenerative disease in both knees and those conditions were permanently aggravated, accelerated or intensified by her on-the-job injuries. Accordingly, claimant requests the left knee replacement be ordered paid under this claim and that claimant's attorney fees be ordered paid.

Respondent argues there is substantial competent evidence to support the ALJ's finding that claimant is not entitled to post-award medical treatment. Accordingly, respondent requests the Board affirm the ALJ's order denying post-award medical treatment and denying claimant's attorney fees.

The issues for the Board's review are:

(1) Is the left knee replacement recommended for claimant necessary to cure and relieve the effects of the accidental injuries which were the subject of the underlying award?

(2) Is claimant entitled to have her attorney fees paid by respondent? If so, in what amount?

FINDINGS OF FACT

This 67-year-old claimant is requesting post-award medical, specifically a left knee replacement. She had settled her claim for injuries to her bilateral knees on May 23, 2005, for 12 1/2 percent to the body as a whole. As part of the settlement, future medical was left open.[1]

Claimant first began having problems with her left knee in 1997. Arthroscopic surgery by Dr. Richard Wendt was performed on January 8, 1998, at which time he performed partial medial and lateral meniscectomies, along with a joint debridement. She was found to have significant degenerative disease, particularly of the medial compartment. Claimant began working for respondent in 1999. Apparently, in March 2000, a resident of the nursing home collapsed while being weighed by claimant. In catching the resident, claimant felt a tearing pain in her left knee. She was treated by Dr.

[1] Claimant's eventual need for knee replacement surgery was anticipated well before the settlement. It is interesting to note that at that May 23, 2005, settlement hearing, the Special Administrative Law Judge stated: "Your medical will be open, but the remainder of the case will be closed. And you need to understand that part of the case that will be closed deals with future compensation should there be a worsening of your condition. For instance, let's say they end up operating on your knees and doing knee replacement surgery. Well, the medical expenses will be paid for. However, if you have any increased disability because of that surgery, you're not going to receive any more compensation."

Roger Hood. On April 20, 2000, Dr. Hood noted claimant's previous scope on the left knee, in which degenerative arthritis was found. At that time, Dr. Hood noted that when bent to 45 degrees, claimant was "bone-on-bone" in the medial compartment of her left knee and said he thought she might need a total knee replacement to keep her employable. On May 17, 2000, Dr. Hood performed arthroscopic surgery on her left knee.

Claimant's March 2000 injury was settled in December 2001 for a 7.5 percent permanent partial impairment to her left knee.

In December 2001, claimant injured her right knee and began having increased pain in her left knee after weighing a 300 pound wheelchair-bound resident. She saw Dr. Hood in April 2002, at which time he noted that an x-ray of the left knee taken that day showed typical arthritic change versus two years before. He said that although her work activities may have aggravated the left knee somewhat, he believed it was just normal arthritic progression in the left knee. Dr. Hood did not obtain x-rays of or treat claimant's right knee. His April 30, 2002, report states that he was not authorized to look at the right knee. Although there was raw bone in her patellofemoral groove when he performed the arthroscopy in 2000, x-rays taken in April 2002 showed good cartilage height in the weight bearing area of the left knee.

On April 26, 2002, claimant filed her current workers compensation claim. Her Application for Hearing claimed a series of injuries to her right knee, left knee, and left ankle from May 25, 2000, to April 24, 2002 and continuing caused by pushing wheelchairs and walking, lifting and maneuvering patients.[2] She last worked for respondent in May 2003.

Claimant began seeing Dr. Mark Rasmussen in May 2002. She was given five Supartz injections in the left knee from July to August 2002 and in the right knee from November 1, 2002, to November 29, 2002. She had another arthroscopic procedure on her left knee, performed by Dr. Rasmussen, in February 2003. On cross-examination, claimant acknowledged that Dr. Rasmussen explained to her that the arthroscopic surgery was to repair tears in the knee but that she would eventually need knee replacement for the degenerative condition and arthritis in her left knee. Claimant also said that Dr. Rasmussen disagreed with Dr. Hood's opinion that claimant's knee was bone on bone. Dr. Rasmussen's report of April 2, 2007, stated:

> With regards to the question of *whether Ms. Cox will need additional treatment*, I think ultimately she will require additional treatment which will involve a total knee replacement of her left knee. *Was this caused by her work-related injury?* Her arthritis was not caused by her work-related injury, but was aggravated by it.[3]

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[2] Form K-WC E-1, Application for Hearing filed April 26, 2002.

[3] Post Award Medical Hearing (Oct. 29, 2007), Cl. Ex. 3 at 2.

Dr. P. Brent Koprivica examined claimant on September 22, 2003, at the request of claimant's attorney. Upon examination, Dr. Koprivica noted that claimant had degenerative deformity of both knees. There was lateral compartment pain in the right knee as well as significant patellofemoral grinding and plica. On the left, claimant has tri-compartmental grinding and pain. In reviewing an x-ray of claimant's left knee dated March 27, 2000, he noted mild degenerative changes and cartilage remaining in both the medial and lateral compartments. X-rays taken on the date of his examination revealed remaining cartilage in the medial and lateral compartments of both knees.

> It is my opinion that Ms. Cox did sustain permanent aggravating injury based on her ongoing work activities from May 25, 2000, through her resignation date of May 29, 2003. I would consider her work activities to be a substantial factor resulting in the permanent aggravation, acceleration and intensification of the pain associated with the degenerative process in the left knee. She did develop recurrent medial and lateral meniscal tears, for which she has undergone partial medial and lateral meniscectomies on February 6, 2003.
>
> I would consider the aggravating injury from cumulative injury from her employment to be a substantial factor in the need for Supartz injections as well as the chondroplasties that have been performed for further debridement purposes.
>
> Ms. Cox has also developed chronic pain in the right knee from cumulative injury. There is a component of compensatory overuse from favoring the left lower extremity associated with the cumulative injury to the right knee. At this point, she does have some degenerative disease in the right knee that is now symptomatic as a direct result of the cumulative injury from May 25, 2000, through May 29, 2003.[4]

Dr. Koprivica also noted that claimant would need future medical treatment. He stated that she would require a total knee arthroplasty in the left knee, with a possible future need for total knee arthroplasty on the right as well.

Dr. Terrence Pratt, who examined claimant on March 5, 2004, at the request of the ALJ, noted that claimant had preexisting involvement in the left knee, with bone-on-bone involvement reported in April 2000 when the knee was bent to a 45 degree angle, and the eventual need for total knee replacement was mentioned at that time. She now has pain and weakness in both knees that is worse with activity and change in the weather. Dr. Pratt rated claimant with a 10 percent impairment to the left knee for a partial medial and lateral menisectomy and 17 percent for the degenerative changes. He also ascribed a 5 percent impairment to the right knee for mild degenerative changes. He related all of these percentages to the work activities for the period of May 25, 2000, until April 24, 2002. These impairments were in addition to her preexisting impairments. As such, Dr. Pratt

[4] Post Award Medical Hearing (Oct. 29, 2007), Cl. Ex. 1 at 12.

attributed a portion of the degenerative changes in claimant's left knee to her work during the period of this claim.

In a report dated July 7, 2006, Dr. John R. Hansen said claimant was in need of a total left knee replacement.

Claimant was seen on March 28, 2007, by Dr. Rasmussen. Dr. Rasmussen stated that claimant needed a total knee replacement on the left because of severe medial compartment arthrosis and generalized arthrosis. He stated that claimant's arthritis was not caused, but was aggravated, by her work-related injuries.

PRINCIPLES OF LAW

In a request for post-award medical treatment, the claimant has the burden to prove her right to an award of compensation and prove the various conditions on which her right depends.[5] In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.[6] Although the passage of time may increase the claimant's difficulty in establishing the causal connection, nonetheless, there are no prohibitions against claimant attempting to prove the current need for medical treatment is related to the previous compensable work-related injury.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[8] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[9]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[10] the court held:

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[5] K.S.A. 2007 Supp. 44-501(a).

[6] K.S.A. 2007 Supp. 44-510k(a).

[7] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[9] *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

[10] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[11] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[12] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[13] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[14]

In *Logsdon*,[15] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

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[11] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[12] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[13] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[14] *Id.* at 728.

[15] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,[16] the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

Finally, in post award proceedings for medical benefits:

> The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.[17]

ANALYSIS

Dr. Hood believes claimant's work activities may have aggravated her knee symptoms, that is, contributed to her pain, but he did not believe it aggravated the underlying degenerative condition. Conversely, Dr. Koprivica, Dr. Pratt, and Dr. Rasmussen opined that claimant's work during the period in question injured her knee and accelerated her degenerative condition, which has now led to her need for knee replacement surgery. The Board is persuaded in particular by the opinion of Dr. Rasmussen that "[claimant's] arthritis was not caused by her work-related injury, but was aggravated by it."[18] Under the Kansas Workers Compensation Act, this is all that is required for a claimant to prove in order for the condition to be compensable.

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[16] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[17] K.S.A. 2007 Supp. 44-510k(c).

[18] *Supra* note 3.

CONCLUSION

Claimant suffered a work-related aggravation of her preexisting degenerative left knee condition. That aggravation accelerated her need for the requested medical treatment. Accordingly, respondent is responsible for providing that treatment. In addition, claimant's counsel is entitled to a reasonable fee for her services performed in connection with this post award proceeding, including the time spent on this appeal.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the post-award medical Award of Administrative Law Judge Foerschler dated January 4, 2008, is reversed as to both the denial of medical treatment and attorney fees and is remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of April, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge